No. 08-1436

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IN THE

Supreme Court of the United States

GERALD K. SMITH, as the Litigation Trustee of the Farmland Dairies LLC Litigation Trust;

G. PETER PAPPAS, as the Plan Administrator of the Plan of Liquidation of Parmalat-USA Corporation

Petitioners,

v.

BANK OF AMERICA CORPORATION, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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RULE

Sup. Ct. R. 10 9

SCHOLARLY AUTHORITY

5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* (Apr. 2009 Supp.) 6

BRIEF IN OPPOSITION

Respondents Bank of America Corporation; Bank of America N.A.; Bank of America National Trust & Savings Association; Banc of America Securities LLC; Banc of America Securities Limited; Bank of America International Limited; Banca Intesa S.p.A.; Banca Nazionale del Lavoro S.p.A.; Credit Suisse; Credit Suisse International; Credit Suisse Europe Limited; Deloitte & Touche USA LLP; Deloitte & Touche LLP; Deloitte & Touche S.p.A.; Deloitte Touche Tohmatsu; Grant Thornton International; and Grant Thornton LLP, respectfully submit this joint brief in opposition to the petition for certiorari.

This case does not implicate the questions presented in the petition. The Second Circuit's decision here did not turn on the application of a "strong inference" standard to allegations of knowledge under Rule 9(b). In fact, in its unpublished decision affirming the dismissal in this case, the Second Circuit did not cite or rely on Rule 9(b) at all, concluding that the allegations here were insufficient under the lesser Rule 8 standard as interpreted by this Court's decision in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007). Further, Petitioners did not properly present the Rule 9(b) issue they now raise to the Second Circuit for its decision in the first instance. Nor did the Second Circuit have occasion to decide the other issue raised in the petition: namely, the extent to which a district court may refer to documents cited in the pleadings in considering a motion to dismiss under Rule 12(b)(6). For all these reasons, further review is not warranted.

COUNTERSTATEMENT OF THE CASE

In late 2003, Parmalat S.p.A., an international dairy conglomerate, and some of its affiliates collapsed in scandal and filed for bankruptcy in Italy. Pet. App. 16a. Litigation ensued, both in Italy and the United States, with much of the United States litigation consolidated into multidistrict litigation before District Judge Lewis A. Kaplan in the Southern District of New York. All told, a total of 18 civil actions, including the *Smith* action, have been consolidated before the district court under the caption *In re Parmalat Securities Litigation*, No. 04 MD 1653.[1]

Petitioners brought these actions on behalf of the successors of two bankrupt Parmalat subsidiaries, Parmalat USA Corp. and Farmland Dairies LLC (collectively, "the Companies").[2] Pet. App. 16a-18a. They alleged that the defendants — an assortment of accounting firms and banks — had taken actions that had the effect of concealing Parmalat's true financial state, causing injuries in two broad categories. First, Petitioners alleged that the defendants had taken certain actions that induced "innocent decision makers" at the Companies to incur debt secured by Parmalat that the Companies would not have

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[1] The *Pappas* action was not formally consolidated for pretrial purposes with the multidistrict litigation, but the parties and the court nevertheless proceeded on that basis.

[2] The district court described Petitioners' second amended complaints — the complaints now at issue — as "long, rambling, repetitious, and disorganized." Pet. App. 22a. Smith's, for instance, is 156 pages and 617 numbered paragraphs — a length the court nonetheless described as a "substantial improvement" over the first amended complaint, which was 342 pages and 1309 numbered paragraphs. *Id.* at 22a n.19.

incurred had they known the truth about Parmalat's finances. *Id.* at 41a-53a. The district court determined that Petitioners' allegations of injury under this theory were insufficiently pleaded and therefore dismissed all of Petitioners' claims "insofar as they sought damages for the Companies' wrongful incurrence of debt." *Id.* at 53a-54a. Petitioners do not seek this Court's review relating to this ruling.

Second, Petitioners alleged that the defendants had taken actions that induced Farmland to enter into a sale-leaseback transaction, the proceeds of which were "'looted'" by corrupt Parmalat insiders. Pet. App. 32a-38a. Petitioners did not allege, however, that any of the defendants, with the exception of Deloitte & Touche USA LLP and its subsidiary Deloitte & Touche LLP (collectively, "Deloitte USA"), "knew about, assisted, or otherwise participated in" the sale-leaseback transaction, let alone the looting of the proceeds. *Id.* at 56a-57a. Accordingly, the district court held that, under *Bloor* v. *Carro, Spanbock, Londin, Rodman & Fass*, 754 F.2d 57 (2d Cir. 1985), Petitioners had failed to plead the element of proximate causation under the "looting" theory as to all defendants other than Deloitte USA. Pet. App. 58a. Again, Petitioners do not seek this Court's review relating to this determination.

As to Deloitte USA, the result was the same, though the analysis was different. Deloitte USA had previously performed audits of the financial statements of one of the Companies in the United States (but never audited Parmalat in Italy), and it performed an appraisal in connection with the sale-leaseback transaction in the United States. Based on those facts, Petitioners alleged that Deloitte USA proximately caused the subsequent looting because it

in fact knew that the proceeds of the transaction would be upstreamed to Parmalat and looted by corrupt insiders in Italy, and that this knowledge could be inferred from Deloitte USA's allegedly improper performance of the audits and appraisal.[3] Pet. App. 59a-75a. The district court analyzed these allegations in detail and determined that Petitioners had failed to satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). *Id.*

Accordingly, on August 8, 2007, the district court granted the various defendants' motions to dismiss Petitioners' second amended complaints. Pet App. 84a-85a. Petitioners then filed a motion for reconsideration or leave to file third amended complaints, which the district court denied. *Id.* at 10a-12a. Petitioners then filed another post-trial motion, styled as a motion to alter or amend the judgment and for leave to file third amended complaints. The district court denied this motion as well. *In re Parmalat Sec. Litig.*, No. 04 MD 1653 (S.D.N.Y. Oct. 30, 2007) (order denying motion to alter or amend judgment).[4]

Petitioners appealed to the United States Court of Appeals for the Second Circuit, a panel of which heard argument and, within a week, affirmed the district court in an unpublished order. Pet. App. 2a.

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[3] Petitioners alternatively alleged that Deloitte USA's knowledge could be imputed under theories of agency and joint venture. The district court found, however, that Petitioners had not sufficiently alleged the existence of either an agency or joint venture relationship. Pet. App. 75a-83a. Petitioners do not seek review relating to these determinations.

[4] This order is not included in Petitioners' Appendix.

The Second Circuit reviewed the district court's dismissal *de novo*, construing Petitioners' complaints liberally, accepting all factual allegations as true, and drawing all reasonable inferences in Petitioners' favor. *Id.* at 4a. Having done so, the court of appeals held that the district court properly dismissed Petitioners' claims against each defendant. *Id.* at 4a-5a.[5]

REASONS FOR DENYING THE PETITION

This Court should deny review because the Second Circuit's disposition of the cases below does not present the questions Petitioners identify.

First, the opinion of the court of appeals does not implicate the question raised by Petitioners regarding the correct interpretation of Federal Rule of Civil Procedure 9(b). Petitioners argue at length that the *district court* misinterpreted the rule to require Petitioners to allege facts sufficient to raise a "strong inference" that the defendants had the knowledge requisite to support their claims. Pet. 8-25. But the district court's opinion was not the last word on the matter. The Second Circuit affirmed the district court's decision upon *de novo* review, and when it did so, it did not apply the "strong inference" test that Petitioners challenge. In fact, the Second Circuit did not even cite Rule 9(b) in its analysis. Rather, the only relevant legal standard that it expressly applied when reviewing Petitioners' allegations was the one set forth in *Twombly*, which

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[5] Although the court concluded its analysis of the issues with the statement that it was affirming for "substantially" the same reasons that the district court had stated, Pet. App. 5a, the Second Circuit did not elaborate on the extent of its agreement with the district court's reasoning.

provides that a complaint meets the pleading requirements of Rule 8 only if it sets forth factual allegations sufficient "to raise a right to relief above the speculative level." 550 U.S. at 555; Pet. App. 4a.

Rule 9(b) sets forth a pleading standard that is "heightened" in comparison to the Rule 8 standard, see *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007), such that meeting the Rule 8 requirements is necessary but not sufficient to meet the requirements of Rule 9(b). See 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1298, at 41 (Apr. 2009 Supp.). Although Rule 9(b) allows a plaintiff to plead scienter "generally," the Rule 8 baseline nonetheless applies to pleadings of knowledge. See *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1954 (2009) ("Rule 9 merely excuses a party from pleading . . . intent under an elevated pleading standard. It does not give him license to evade the less rigid — though still operative — strictures of Rule 8."). Even under the "less rigid" strictures of Rule 8, a complaint still must set forth "plausible grounds to infer" that the plaintiff is entitled to relief. See *Twombly*, 550 U.S. at 557; see also *Iqbal*, 129 S. Ct. at 1949 (a complaint must contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged").

Just last month, in *Iqbal*, this Court interpreted Rule 8 to hold that a court need not accept a complaint's allegations of discriminatory intent "without reference to its factual context," 129 S. Ct. at 1954, explaining that a plaintiff may not merely "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Id.*

Petitioners, however, seek review because they hope to do precisely that.[6] See Pet. 20-22 (arguing that Rule 9(b) precludes a court from requiring a plaintiff to allege enough facts to support *any* inferences about scienter). Petitioners have not explained to this Court how their allegations could have satisfied this Rule 8 threshold, even though the Second Circuit's opinion — which cited Rule 8 but not Rule 9(b) — provides a strong indication that the court below did not believe they had. Quite simply, even if this Court were to conclude that a circuit split exists regarding the requirements of Rule 9(b), and that it would be appropriate for this Court to address the issue now without providing an opportunity for the courts of appeals to respond to the *Iqbal* decision, this case would remain an inappropriate vehicle because the only Rule on which the Second Circuit expressly relied in this case is Rule 8, not Rule 9(b).

Further, Petitioners' failure properly to present this argument below provides an independent reason for this Court to deny review on the Rule 9(b) question. See, *e.g.*, *Glover* v. *United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below."). In contrast to their arguments before this Court, Petitioners did not argue to the Second Circuit that the district court's interpretation of Rule 9(b) was incorrect. To the contrary, Petitioners actually argued in their Second Circuit briefs that the court *should* apply the "strong inference" standard as

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[6] Although Petitioners suggest that their reading of Rule 9(b) finds support in certain circuits other than the Second Circuit, any such authority will almost certainly be re-evaluated by those courts in light of *Iqbal*. Accordingly, review of the issue purportedly presented in this case would be premature.

explained in *Tellabs*.[7] Smith Br. at 31 (arguing, under *Tellabs*, that a court must assess whether allegations allow a reasonable person to draw an inference of scienter at least as strong as any opposing inference). Petitioners did suggest — in a footnote — that the PSLRA's "strong inference" standard does not apply because this case is not governed by the PSLRA, *id.* at 31 n.13, but Petitioners wholly failed to address the fact that the Second Circuit applies this standard to all allegations of fraud as its interpretation of Rule 9(b).[8] See, *e.g.*, *First Capital Asset Mgmt., Inc.* v. *Satinwood, Inc.*, 385 F.3d 159, 178-79 (2d Cir. 2004) (applying "strong inference" standard to allegations of bankruptcy fraud); *Ouaknine* v. *MacFarlane*, 897 F.2d 75, 80 (2d Cir. 1990) (applying same before enactment of the PSLRA). Accordingly, the court of appeals had no occasion to address the question presented here because the law in the Second Circuit is clear that "[a] contention is not sufficiently presented for appeal if it is conclusorily asserted only in a footnote" or if it is "'adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation.'" *Tolbert* v. *Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001).

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[7] Petitioners filed separate but nearly identical opening briefs before the Second Circuit. *Compare* Brief and Special Appendix for Plaintiff Appellant Gerald K. Smith, 309 F. App'x 536 (2d Cir. filed Feb. 1, 2008) ("Smith Br."), *with* Brief and Special Appendix for Plaintiff Appellant G. Peter Pappas, 309 F. App'x 536 (2d Cir. filed Jan. 8, 2008) (corrected).

[8] Deloitte USA, in its Second Circuit brief, made precisely this point. *See* Brief for Defendants-Appellees Deloitte & Touche LLP and Deloitte & Touche USA LLP at 19-21, 309 F. App'x 536 (2d Cir. filed Mar. 3, 2008). Petitioners did not address this issue at all in their reply briefs.

Second, the question of what evidence a court may consider in ruling on a motion to dismiss also is not properly before this Court. The Second Circuit affirmed upon a *de novo* review of the record, and its brief opinion places no specific reliance on the particular documents to which Petitioners now refer.[9] See Pet. App. 4a-5a. Again, this is unsurprising: Although Petitioners argued to the Second Circuit that the district court should not have considered these documents, they did so in cursory fashion, without articulating many of the arguments they now raise. For instance, they did not argue that the documents should not have been considered because they were not attached to the complaint, and they argued only that documents other than written instruments are not often considered, not that such consideration would be contrary to law. See Smith Br. at 32-33.

Moreover, the error Petitioners assert is that the court misapplied a properly stated rule of law. Although Petitioners contend that the district court considered certain documents for an improper purpose, they concede that the district court purported to apply the correct legal standard. Pet. 36 ("Despite the district court's acknowledgement that it may not consider extraneous documents for their truth, this was not the rule that it followed."). Given that the asserted error "consists of . . . the misapplication of a properly stated rule of law," Sup. Ct. R. 10, this Court's review is not warranted.

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[9] Indeed, Petitioners' suggestion that the district court's treatment of the documents conflicts with the law of the Second Circuit, *see* Pet. 29 n.6, coupled with the Second Circuit's silence on the issue, reinforces the conclusion that the court of appeals did not consider the documents.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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